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No. 00-

IN THE

Supreme Court of the United States

LOUIS ANTHONY MANNA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LOUIS ANTHONY MANNA, *PRO SE*
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QUESTION PRESENTED

Should this Court grant Certiorari, vacate the judgment and remand for further proceedings, in a case where the lower court's denial of a Habeas Corpus petitioner's application and request for issuance of a Certificate of Appealability undermines this Court's recent directive in *Slack v. McDaniel*, 529 U.S. __, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000), that a certificate of appealability should issue when the prisoner shows, at least, that jurist of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right?

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CITATIONS OF OPINIONS AND ORDERS

The Court of Appeals unwritten Judgment Order Affirming Mr. Manna's conviction and sentence is reported at *United States v. Manna*, 919 F.2d 733 (3d Cir. 1990). App. F. This Court's Order denying Mr. Manna's Petition for Writ of Certiorari is reported at *United States v. Manna*, 499 U.S. 949, 111 S. Ct. 1418, 113 L. Ed. 2d 471 (1991). App. E. The Memorandum Opinion and Order of the United States District Court for the District of New Jersey denying Mr. Manna's 28 U.S.C. § 2255 Motion is unpublished. App D. The Memorandum Opinion and Order of the United States District Court for the District of New Jersey denying Mr. Manna's application for a Certificate of Appealability is unpublished. App. B. The Court of Appeals Order denying Mr. Manna's request for a Certificate of Appealability is unpublished. App. A. Finally, the Court of Appeals Order denying Mr. Manna's Petition for Rehearing is unpublished. App. G.

BASIS FOR JURISDICTION

The Court of Appeals Order denying Mr. Manna's request for a Certificate of Appealability was filed on October 19, 2000. A timely Petition for Rehearing was filed on November 6, 2000. The Court of Appeals Order denying Mr. Manna's Petition for Rehearing was issued on January 2, 2001, and is set forth in App. G. This Court's jurisdiction in invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides verbatim:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides, verbatim:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

Title 28 U.S.C. § 2253(c) provides verbatim:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

On September 26, 1989, Mr. Manna was sentenced to 80 years imprisonment following conviction by jury trial, conducted in the United States District Court, District of New Jersey, Honorable Maryanne Trump Barry presiding, for his alleged participation in a racketeering (RICO) conspiracy and RICO substantive counts charging murder, loansharking, gambling and labor payoffs. The District Court had jurisdiction to enter judgment under 18 U.S.C. § 3231.

The evidence adduced during trial to secure Mr. Manna's conviction consisted of partially inaudible, intercepted tape recorded conversations from which the government deduced inference in propounding its theory of the case. No direct evidence was introduced during trial to establish Mr. Manna's direct participation in the RICO conspiracy and substantive counts charged in the indictment. Mr. Manna's conviction was affirmed on appeal without opinion reported at *United States v. Manna*, 919 F.2d 733 (3d Cir. 1990) (App. F), and his subsequently filed petition for Writ of Certiorari was denied as reported at *United States v. Manna*, 499 U.S. 949, 111 S. Ct. 1418, 113 L. Ed. 2d 471 (1991). App. E.

On April 21, 1997, with the assistance of retained counsel, Mr. Manna filed a Post-Conviction Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2255, in the United States District Court District of New Jersey, in which Mr. Manna alleged that he was deprived of his Sixth Amendment right to the effective assistance of counsel and his Fifth Amendment right to due process as a result of the government's failure to disclose *Brady* material.

In his Petition, Mr. Manna specifically pleaded that counsel's performance was constitutionally deficient in failing to adequately challenge the admissions of intercepted tape recorded conversations at a pretrial *Starks* hearing or *Franks* hearing and that counsel's performance was deficient in failing to adequately challenge voice attributions and the content of intercepted tape recorded conversations by submitting evidence in counsel's possession that would have refuted the government's allegations.

And further that the government's withholding of *Brady* material in this case had a strong probability of changing

the outcome of the trial particularly because documents of the withheld *Brady* material exonerated Mr. Manna's involvement with the criminal activity he was alleged to have participated in. One such instance alleged by Mr. Manna involved information that was provided to authorities by a former New York City Police Detective named Remo Franceschini who after retiring wrote a book entitled "A Matter of One Cop's Life-Long Pursuit of John Gotti and the Mob" in which he admitted that he provided information to authorities that someone other than Mr. Manna planned and participated in the murder of Irwin Schiff. And another instance involved a document Mr. Manna received through Freedom of Information Act requests which revealed that authorities concluded in a previous investigation that the "Genovese People," of whom the government asserted Mr. Manna was a member of, were not responsible for the murder of Irwin Schiff.

Mr. Manna alleged further that the government withheld several documents related to the government's authorizations to intercept tape recorded conversations which impeded counsel's ability to effectively move to suppress the tape recorded conversations. One such document revealed that the government had sent the intercepted tape recorded conversations to be enhanced without court authorization before the court ordered the tapes sealed and several others revealed that the government used reckless, misleading and false information to obtain extensions on the government's authorization to intercept tape recorded conversations.

On January 29, 1998, in a Memorandum Opinion and Order the District Court denied Mr. Manna's Petition for Post-Conviction relief, essentially asserting therein that the alleged errors had no merit. (App. D)

On February 6, 1998, Mr. Manna filed a timely Notice of Appeal and a joint Motion for Reconsideration and application for issuance of a Certificate of Appealability reasserting therein his Sixth Amendment claim based on ineffective assistance of counsel and his Fifth Amendment claim based on the government's failure to disclose *Brady* material.

In the interval the Court of Appeals for the Third Circuit issued an Order dated February 27, 1998, (App. C), staying the appeal until the District Court's decision on Mr. Manna's joint Motion for Reconsideration and Certificate of Appealability, and while awaiting the District Court's ruling Mr. Manna's counsel of record filed several declarations seeking to supplement Mr. Manna's Motion for Reconsideration with newly discovered evidence and additional issues.

On August 4, 1999, in addressing each of the declarations filed on Mr. Manna's behalf, the District Court issued a Memorandum Opinion and Order denying Mr. Manna's joint Motion for Reconsideration and application for issuance of a Certificate of Appealability.

Shortly after which Mr. Manna's attorney forwarded a memorandum in support of his Notice of Appeal which had been construed as a request for issuance of a Certificate of Appealability, along with a joint Order seeking reconstruction of the record and motion for Summary Reversal and grant of § 2255 relief with accompanying exhibits to the Court of Appeals for the Third Circuit, asserting therein that Mr. Manna's Sixth Amendment right to the effective assistance of counsel and his Fifth Amendment right, under the due process clause, to disclosure of *Brady* material had been infringed upon.

On October 19, 2000, the Court of Appeals for the Third Circuit issued an Order denying Mr. Manna's request for issuance of a Certificate of Appealability in relying on the District Court's previous Order denying Mr. Manna's § 2255 Petition.

On November 22, 2000, Mr. Manna filed a Petition for Rehearing in the Court of Appeals for the Third Circuit and on January 2, 2001, the Court of Appeals for the Third Circuit issued an Order denying Mr. Manna's Petition for Rehearing (App. G).

REASON FOR GRANTING THE WRIT

This case presents an important question concerning the criteria that must be met by a habeas corpus petitioner to demonstrate a substantial showing of the denial of a constitutional right in order to qualify for issuance of a certificate of appealability.

Certiorari should be granted because the lower court's decision denying Mr. Manna's application and subsequent request for issuance of a certificate of appealability undermines this Court's recent directive in *Slack v. McDaniel*, 529 U.S. __, 146 L. Ed. 2d 542, 555 120 S. Ct. 1595 (2000), that a certificate of appealability should issue when the prisoner shows, at least, that jurist of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right.

Additionally, Certiorari should be granted to resolve inconsistencies in decisions of the appellate courts regarding the appropriate application of this Court's recent decision in *Slack v. McDaniel*, 529 U.S. __, 146 L. Ed. 2d 542, 120

S. Ct. 1595 (2000), which adopted the legal standard established in *Barefoot v. Estelle*, 463 U.S. 880, 892-93 (1983), with regard to the criteria that must be met by a habeas petitioner, whose habeas petition has been denied, in order to demonstrate a substantial showing of the denial of a constitutional right to qualify for issuance of a certificate of appealability.

In *Slack v. McDaniel*, 529 U.S. __, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000), this Court reversed and remanded the Ninth Circuit's ruling denying petitioner Slack's request for a certificate of appealability in holding, inter alia,

> when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurist of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurist of reason would find it debatable whether the district court was correct in its procedural ruling.

Id., 146 L. Ed. 2d at 551.

In *Slack v. McDaniel*, *supra*, this Court observed:

> . . . Except for substituting the word "constitutional" for the word "federal" S 2253 is a codification of the CPC standard announced in *Barefoot v. Estelle*, 463 U.S. at 894, 77 L. Ed. 2d 1090, 103 S. Ct. 3383. Congress had before it the meaning Barefoot had given to the language found

> in § 2253(c) the meaning ascribed it in Barefoot, with due note for the substitution of the word "constitutional". See *Williams v. Taylor*, 529 U.S. __, 146 L. Ed. 2d 435, 120 S. Ct. 1479 (2000). To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurist could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." *Barefoot*, 463 U.S. at 893, and n.4, 77 L. Ed. 2d 1090, 103 S.Ct. 3383 ("sum[ming] up" the "substantial showing" standard)." *McDaniel*, 146 L. Ed. 2d at 554.

In *Barefoot v. Estelle*, the court in defining the "substantial showing" standard, admonished lower courts that they may not deny applications for probable cause certificates solely because the petitions have already been denied on the merits in noting that:

> obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, a certificate must issue if the appeal presents a "question of some substance," i.e., at least one issue that is "debatable among jurist of reason"; that a court could resolve in a different manner"; that is "adequate to deserve encouragement to proceed further"; or that is not "squarely foreclosed by statute; rule, or authoritative court decision, or that is not lacking any factual basis in the record."

Barefoot, 463 U.S., at 893 n.4, 894.

Although, the operative facts which formed the basis of this Court's decision in *Slack v. McDaniel* are distinguishable from those in the present case, the legal standard established in *Barefoot* governing the issuance of certificates of appealability equally applies in both cases.

Here, in his application and subsequent request for issuance of a certificate of appealability, Mr. Manna pleaded that his Sixth Amendment right to the effective assistance of counsel and his Fifth Amendment right, under due process to disclosure of exculpatory material, were infringed upon.

With regard to his Sixth Amendment claim, Mr. Manna specifically pleaded counsel's performance was deficient in failing to object to or adequately challenge the admission of a redacted version of an August 5th 1987 tape recorded conversation which government alleged established proof that Petitioner's co-conspirators were discussing a plan to commit murder, even though, the government failed to establish that the tape recorded conversation was made in furtherance of either of the conspiracies charged in Mr. Manna's indictment or that the voices on the redacted tape recorded conversation were in fact Mr. Manna's co-conspirators; that counsel's performance was deficient in failing to present favorable evidence in counsel's possession that would have refuted the government's allegation that Mr. Manna's voice was recorded on the August 5th 1987 tape recorded conversation and that would have established that the same recorded conversation was discussing work shifts instead of a plan to murder Irwin Schiff; that counsel's performance was deficient in failing to present the testimonies of Dennis Roman, Thomas Smith and Joe Petrizzo each of whom submitted affidavits which were included as Exhibits C, D and E in Mr. Manna's § 2255

Motion, attesting to the fact that they had informed Mr. Manna's trial counsel that their voices were the voices heard on the August 5th 1987 tape recorded conversation and they were discussing work shifts instead of the murder of Irwin Schiff, that counsel's performance was deficient in failing to present video surveillance recordings of Casella's restaurant which would have supported Roman, Smith and Petrizzo's offered testimonies by corroborating that they were in Casella's restaurant on August 5th 1987; that counsel's performance was deficient in failing to present favorable evidence which consisted of F.B.I. Agent Dinsmore's ELSUR logs containing notations concerning the August 5th 1987 tape recorded conversation which referred to work shifts as the topic of discussion instead of the planned murder of Irwin Schiff; that counsel's performance was deficient in failing to subpoena Kiwanis Club members who regularly met at Casella's restaurant and could have provided testimony refuting the government's theory that one of the discussions attributed to Mr. Manna was a discussion they were participants in during which Mr. Manna was not present; and that counsel's performance was deficient in failing to conduct a pretrial *Starks* hearing on the admissibility of the taped recorded conversations which consisted of the only evidence used against Mr. Manna and which would have revealed what Mr. Manna later learned through post-trial Freedom of Information Act document disclosure (a copy of which was included as Exhibit N in Mr. Manna's § 2255 Motion), *i.e.*, that the government sent each of the tape recorded conversations to be enhanced without court authorization before they were ordered sealed by the district court prior to trial.

As for his Fifth Amendment claim, Mr. Manna pleaded that the government withheld exculpatory material that was

relevant to his innocence or guilt concerning information provided by a Queens New York City Police Detective named Lieutenant Commander Remo Franceshini, exonerating Mr. Manna of the Irwin Schiff murder. Mr. Manna learned of this information after reading a book written by Franceshini entitled "A Matter of Honor", the relevant portions of which were included in Mr. Manna's § 2255 Motion as Exhibit J.

Mr. Manna pleaded further that the government withheld material documents related to the Irwin Schiff murder that would have revealed that the New York City Police Department was investigating the Irwin Schiff murder together with federal authorities which corroborates that federal authorities knew about the information Franceshini provided to authorities (a copy of which was included in Mr. Manna's § 2255 Motion as Exhibit AA and K).

Mr. Manna also pleaded that the government withheld documents which would have revealed that F.B.I. agents attempted to compare his voice to the voices on the taped recorded conversations used during trial and their voice comparisons failed to lead to Mr. Manna and another document which established that federal authorities had at one point in time concluded in their investigation that the murder of Irwin Schiff was not committed by the "Genovese people" whom the government asserted during trial that Mr. Manna was a member of.

Explicitly and implicitly, Mr. Manna pleaded in both his application and subsequent request for issuance of a certificate of appealability that his Sixth Amendment ineffective assistance of counsel claim and his Fifth Amendment due process claim, resulting from the

government's failure to disclose exculpatory material, were interrelated in that the government's failure to disclose exculpatory material – which had a strong probability of changing the outcome of the trial – impeded trial counsel's ability to effectively move to suppress the taped recorded conversations and mount an adequate defense during trial.

Moreover, since the only evidence used against Mr. Manna during trial consisted of taped recorded conversations from which the government piled inference upon inference, every error that counsel made and every document that the government failed to disclose in this case had a drastic impact on the outcome of the trial.

Several Circuits including the Third Circuit have held an attorney's failure to investigate or present potential defenses can amount to the ineffective assistance of counsel infringing upon a defendant's Sixth Amendment right to the effective assistance of counsel. *E.g. United States v. Baynes*, 687 F.2d 659 (3d Cir. 1982) (Trial counsel's failure to investigate possibilities of distinguishing examples of defendant's voice from the voice on intercepted tape recording, where intercepted tape recording was the only evidence against defendant, deprived defendant of his Sixth Amendment right to effective assistance of counsel); *Miller v. Wainwright*, 798 F.2d 426 (11th Cir. 1986) (Trial counsel's failure to investigate alternative lines of defense may deprive a defendant of his Sixth Amendment right to the effective assistance of counsel); *Maddox v. Lord*, 818 F.2d 1058 (2d Cir. 1987) (Trial counsel's failure to investigate forensic evidence fell below an objective standard of reasonableness and deprived defendant of his Sixth Amendment right to the effective assistance of counsel); and *United States v. Dawson*, 857 F.2d 923 (3d Cir. 1988)

(Trial counsel deprived defendant of his Sixth Amendment right to the effective assistance of counsel as a result of counsel's failure to call or interview witnesses whose testimony would have shown that the voice on a taped recorded conversation used as evidence was not the voice of defendant).

And several Circuits including the Third Circuit have held that a defendant can be deprived of his Sixth Amendment right to the effective assistance of counsel as a result of counsel's failure to subpoena witnesses. *E.g.*, *Nealy v. Cabana*, 764 F.2d 1173 (5th Cir. 1985); *Eldridge v. Atkins*, 665 F.2d 228 (8th Cir. 1981) and *United States v. Gray*, 878 F.2d 702 (3d Cir. 1989).

This Court, the Third Circuit and other circuits have held that the government's failure to disclose exculpatory material that is relevant to an appropriate determination of guilt violates a defendant's Fifth Amendment right to due process. *E.g.*, *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (The government's failure to disclose evidence that is material to the issue of guilt and is exculpatory in nature violates a defendant's right to due process); *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (*Brady* materiality is not evaluated by a sufficiency of evidence test); *Knox v. Iowa*, 131 F.3d 1278, 1283 (8th Cir. 1997); *United States v. Joseph*, 996 F.2d 36, 39 (3d Cir. 1993) (There must be a reasonable probability that the nondisclosure would have led to a different result at trial, thus undermining confidence in the jury verdict); and the Second Circuit in *Tate v. Wood*, 963 F.2d 20 (2d Cir. 1992), observed that the government's failure to disclose exculpatory material may also infringe upon a defendant's Sixth Amendment right to the effective assistance of counsel.

Particularly because Mr. Manna's constitutional claims are claims of substance, not lacking any factual basis in the record and could have been resolved differently by jurist of reason, Mr. Manna contends the lower court's denial of his application and subsequent request for issuance of a certificate of appealability undermines this Court's recent directive in *Slack v. McDaniel*, that under such circumstances a certificate of appealability should be issued. *Slack*, 146 L. Ed. 2d at 554-55.

Additionally, the lower courts' denial of Mr. Manna's application and request for issuance of a certificate of appealability is in conflict with the legal standard governing the issuance of certificates of appealability established in *Barefoot v. Estelle*, as adopted by this Court in *Slack v. McDaniel*, which precludes the lower courts from denying prisoners simply because they have not prevailed on the merits. *Barefoot*, 463 U.S. at 894 n.4 ("In requiring a 'question of some substance', or a 'substantial showing of the denial of [a] federal right,' obviously the petitioner need not show that he should prevail on the merits. He has already failed in the endeavor. Rather, he must demonstrate that the issues are debatable among jurist of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.' ").

Finally, the lower court's denial of Mr. Manna's application and subsequent request for issuance of a certificate of appealability is inconsistent with other Courts of Appeals' decisions which require issuance of certificates of appealability in cases such as this. *E.g.*, *Roberts v. Sutton*, 217 F.3d 1337, 1339-40 (11th Cir. 2000), (observing essentially that if a petitioner's allegations are taken as true

and have enough arguable merit (at least on the present record) for reasonable jurist to debate, a certificate of appealability should be issued); *Romero v. Furlong*, 215 F.3d 1107, 1111 n.2 (10th Cir. 2000) (same); *Lembright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (elaborating on the *Barefoot* standard in observing that a petitioner need not show he would prevail on the merits in order to obtain a certificate of appealability).

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED OCTOBER 19, 2000

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. ***98-5131***

LOUIS ANTHONY MANNA

vs.

UNITED STATES OF AMERICA

(D.N.J. CIV. NO. 97-CV-02034)

Present: NYGAARD, ROTH, AND RENDELL, *CIRCUIT JUDGES*

Submitted are:

(1) Appellant's "Notice of Motion for (a) Reconstitution of Record Stricken by District Court Judge; (b) a Certificate of Appealability; (c) Leave to File An Oversized Memorandum in Support of a Certificate If Required, and (d) Summary Reversal" which may be construed as containing appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1);

(2) Appellant's "memorandum in support of certificate of appealability, an order reconstructing the record, and for summary reversal and a grant of 2255 relief;" and

Appendix A

(3) Appellant's exhibits

in the above-captioned case.

Respectfully,

Acting Clerk

ORDER

The foregoing request for a certificate of appealability is denied because, for essentially the same reasons as those given by the District Court in denying the appellant's section 2255 motion, we find that he has failed to make a substantial showing of the denial of a constitutional right. To the extent that the Rule 60(b) motion presented new claims or new evidence in support of claims previously presented and rejected by the District Court, it should have been denied as an unauthorized successive section 2255 motion. *See Burris v. Parke*, 130 F.3d 782, 783 (7th Cir. 1997). The motion to file an oversized memorandum is granted; the motions for reconstruction of the record and summary reversal are denied.

By the Court,

s/ [illegible]
Circuit Judge

Dated: OCT 19 2000

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND FILED AUGUST 4, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action
No. 97-2034 (MTB)
(Crim. No. 88-239 (MTB))

LOUIS ANTHONY MANNA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

OPINION

BARRY, District Judge

On January 29, 1998, this court filed a thirty-one page opinion denying the application of petitioner, Louis Anthony Manna, for a writ of habeas corpus pursuant to 28 U.S.C. § 2255. That petition and petitioner's reply to the government's answer totalled ninety-three pages plus a raft of exhibits. Culled to its essence, the petition complained of the ineffective assistance of trial counsel and misconduct by the New York City police and/or the prosecution up to and including *Brady* violations. This court found the petition to be utterly without merit.

Appendix B

On February 6, 1998, petitioner filed a timely motion for reconsideration and also, it appears, a notice of appeal to the Court of Appeals for the Third Circuit.[1] The motion for reconsideration argued that "while the Court addressed (or purported to address) many of the issues raised by Petitioner, in fact the Court did not address a number of those issues." Shevitz Decl. dated 2/5/98 ¶ 2. The issues unaddressed by the court, all of which go to the ineffective assistance claim, were (1) counsel's failure to challenge the use of video surveillance without a court order, citing *United States v. Williams*, 124 F.3d 411 (3d Cir. 1997); (2) counsel's "inattention" to the fact that the audio tapes were sent to the FBI laboratory in Washington, D.C. for enhancement without a court order, a "serious" violation, *see id.* at ¶ 4; (3) counsel's failure to challenge or diligently investigate the government's compliance or non-compliance with the wiretap orders; and (4) certain unspecified challenges to the government's evidence which, despite counsel's assurances to petitioner, were not made and, although fifty-six witnesses were called on the defense case, certain unidentified witnesses who were not called.[2] Importantly, nothing *in* this court's opinion was seriously challenged in any way.

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1. By order dated February 27, 1998, the Court of Appeals stayed the appeal pending decision on the motion for reconsideration and directed that the parties file written reports on the status of the motion every thirty days.

2. After addressing in its opinion the host of complaints addressed to what trial counsel did or did not do with reference to the tapes and transcripts utilized at trial, the court described the remaining examples of counsel's supposed ineffectiveness as "pure

(Cont'd)

Appendix B

So far, so good. Had the government filed a prompt response to the motion for reconsideration, which it did not, and had the court moved swiftly with or without the government's response to dispose of the motion, which *it* did not, the court would not be in the pickle in which it now finds itself, having to review hundreds upon hundreds of pages of various memoranda, declarations, and exhibits submitted by petitioner. The first of these came in on March 5, 1998, when counsel for petitioner filed a "Declaration in Further Support of Motion for Reconsideration and to bring Newly-Obtained Information to the Court's Attention."[3] That

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(Cont'd)
bologna" and dealt with a "smattering" of them to illustrate that conclusion. Opinion at 16. The court now disposes of the four matters which formed the entire basis of petitioner's motion for reconsideration as filed, matters which, he argued, should have been but were not decided by the court.

First, *Williams* addressed the issue of an order to conduct video surveillance *inside* a premises, and did not deal with the perfectly appropriate video surveillance out in the open, at issue here. Second, nothing in 18 U.S.C. § 2518 requires sealing prior to enhancement and nothing prohibits enhancement prior to sealing. Third, petitioner's complaint that trial counsel should have but did not challenge the wiretap orders where there is no suggestion that there had been any noncompliance by the government with the orders much less that petitioner was prejudiced thereby is rejected. Finally, this court cannot rule on unspecified challenges which supposedly should have been made to the government's evidence and in its opinion has already ruled on the potential witnesses petitioner identified in the petition and complained that counsel did not call.

3. Even before it received the government's response, the court had drafted an order denying the motion for reconsideration which it did not file when it received counsel's Declaration of March 5, 1998.

Declaration averred that "ONLY TODAY" petitioner had received material in response to one of his numerous Freedom of Information Act ("FOIA") requests which showed "a further *Brady* violation and withholding of material information on the government's part." Shevitz Decl. dated 3/5/98 ¶ 1. One document purportedly showed "*both* a withholding of critical information concerning witness Vivian Lewis and her identification of DeSciscio as a participant in the Schiff murder, *and* the joint participation of the New York City police with the Newark and New York FBI. It also shows that a year before the 1988 indictment, the government fully intended to bring this RICO case against [petitioner]." *See id.* ¶ 3 (emphasis in original). The greatest significance of this document, counsel opined, was that it showed that a photograph of DeSciscio was shown to Vivian Lewis as part of a photo spread. Ms. Lewis, counsel continues, never testified that she had been shown a photo spread and the defense was never told of the photo spread or that Ms. Lewis had seen a photo of DeSciscio before she identified him at the federal courthouse. *See id.* ¶¶ 6, 7. Counsel promised to supplement the record with that document and any others when she received them, concluding that this is yet another "dereliction." *See id.* ¶ 8.

The documents were submitted on March 20, 1998, attached to a "Declaration Forwarding Documents Referred to in Declaration to Bring Newly-Obtained Information to the Court's Attention." Given counsel's tendency to exaggerate and mischaracterize, a tendency seen throughout this proceeding, it was not surprising that the document discussed in the March 5, 1998 Declaration, while accurately quoted, had been inaccurately described. As relevant here,

that document said simply that "a photograph of Richard DeSciscio, AKA 'Bocci,' was provided by Newark to . . . NYCPD . . . so that a photo spread could be shown to a witness in the Irwin Schiff investigation." Shevitz Decl. dated 3/20/98, Exh. at 1. Even assuming that the unnamed witness was Ms. Lewis, there is nothing in the document which says that she was ever shown a photograph of DeSciscio or a photo spread containing his photograph and the undisputed evidence, to be discussed *infra*, was that she was not. This document and several others in the package were also submitted to show the "close working relationship between the Police Department and the prosecutors, as well as between New York and Newark." Shevitz Decl. dated 3/20/98 ¶ 3. This, of course, was neither new nor a surprise and, indeed, at trial the court, at the request of the defense, reviewed the New York City Police Department's Schiff homicide file for *Brady* purposes.

Finally, another document allegedly showed that government investigators "sought out the witnesses not presented by [petitioner's] trial counsel (Tom Smith, Dennis Roman, and/or Joe Petrizzo), apparently realizing that *they* had been the 'unsubs' in the August 5, 1987, conversations at Casella's — as they would have testified." *See id.* at ¶ 4 (emphasis in original). This document does not say, however, that government investigators "sought out" those witnesses but only that the author of the document and "Newark personnel" compared an unidentified voice intercepted "during a Squad C-7 Title III" with voices in a conversation intercepted on August 5, 1987 between co-defendent Casella and "two unknown males (UNSUBS)" and agreed that there were similarities in the voice comparisons but they were

"certainly not identical." *See id.*, Exh. at 5. A later document has the author stating that during his efforts to familiarize himself with voices on five different tapes and to search for "voice clues," he thought "there is a possibility" that the voice of unnamed male #2 on the August 5th conversation was the same as that of the unknown male in the August 10th conversation. *See id.* at 12-13. How this advances petitioner's case one iota is beyond this court's comprehension unless the court accepts petitioner's argument that it was Messrs. Smith, Roman and/or Petrizzo and not petitioner on the August 5, 1987 tape, an argument raised for the first time "only recently" after at least one of the three men "spoke" to petitioner, and further accepts as fact that "unnamed males #1 and #2" on the August 5th tape were two of the three men because they and petitioner's new expert, retained in 1996, say so. The court rejected this argument once, *see* Op. at 11-12, 14 and n.5, and rejects it again.

In any event, given counsel's promise of what the documents would show, and, if so, the importance of those documents, the court directed the government to file a response. Before that response was submitted, on June 1, 1998 yet more documents were received from petitioner attached to a "Declaration in Further Support of Motion for Reconsideration and to Bring Newly-Obtained Information to the Court's Attention," documents which supposedly showed yet further evidence of withholding by the government of information concerning the Schiff murder. These documents, too, were obtained in response to petitioner's FOIA requests and, according to counsel, showed that Schiff had given the FBI "certain information" about certain individuals in 1977-78, i.e. more than ten years before his murder.

Appendix B

Separate and apart from the fact that giving "certain information" — and certainly the information Schiff gave — does not an informant make, counsel concedes, in one of the few things she agrees that trial counsel did right, that both before and at trial, trial counsel requested information on whether Schiff had been an informant and was told he had not been an informant for the FBI. Postal Inspector LaPerla, however, on trial counsel's recross examination and to counsel's "complete shock," stated that Schiff had been an FBI informant. Shevitz Decl. dated 6/1/98 ¶ 4. The court permitted the defense to examine LaPerla outside the presence of the jury as to the basis of his knowledge. LaPerla testified that, although no agent of the FBI had said so, an Assistant U.S. Attorney in E.D.N.Y. had told him that "maybe [in] the early or mid '70s," Schiff had provided "very limited information" to the FBI. LaPerla did not know when, if at all, Schiff provided information or what that information may have been. *See id.*, Exh. B at 51-52, 59. The government, nonetheless, offered to have the FBI check to see if there was an informant file on Schiff, and there was not. *See id.* at 64. All that petitioner brings before this court at this late date are the 302's of four interviews of Schiff by the FBI in 1977 and January 1978 primarily regarding $50,000 in "consultant fees" he was paid with even petitioner grudgingly conceding that "this alone may not mount [sic] to a *Brady* violation." *Id.* at ¶ 10. Petitioner is right.

On June 16, 1998, the government submitted its response which briefly addressed all of the issues petitioner raised and this court has discussed. Moreover, and in spite of the fact that, as the court noted above, the document to which petitioner initially pointed did not state that Ms. Lewis was

ever shown a photograph of petitioner, the government submitted the affidavit of Special Agent John Mullaney, the case agent. In that affidavit, Special Agent Mullaney states that no photograph of DeSciscio or photo spread containing his photograph was ever presented to Ms. Lewis, who was the sole witness to observe the gunman, and she never identified DeSciscio as the man she had seen at the scene of the Schiff murder prior to seeing him in the courthouse. Mullaney Aff., June 15, 1998, ¶¶ 2-3, Exh. A to Government's memorandum dated June 16, 1998. There is no evidence to the contrary.

Unfortunately, like the Daytona 500, counsel was just getting revved up and, on July 23, 1998, submitted a forty-seven page Declaration — "Declaration in Yet Further Support of Motion for Reconsideration and to bring Newly-Obtained Information to the Court's Attention; in Response to Government's June 16, 1998 Submission; and to Add Further Ground Justifying Habeas Relief."[4] Attached to this one inch thick Declaration as exhibits were hundreds of pages, in three volumes several inches thick — Exhibit Z — containing all kinds of material, including the "entire array" of documents petitioner received pursuant to his FOIA request concerning Schiff — all heaped on the court in support of the motion for reconsideration. Again, albeit in somewhat of a weak moment, this court accepted this mass of "newly obtained information" because of its arguable

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4. The "further ground," raised and thereafter dropped, was the virtually immediately vacated decision of the Court of Appeals for the Tenth Circuit in *United States v. Singleton* because "the rationale for the decision . . . is completely sound!" Shevitz Decl. dated July 23, 1998 at 47.

relevance to the *Brady* claim raised in the petition, the rejection of which was before the court on reconsideration.[5] In any event, this court assumed that if it did not deal with this mass of materials now, the Court of Appeals and, perhaps, this court were the Court of Appeals to let petitioner in the gate, would surely see the materials later when petitioner filed a second or successive petition under 28 U.S.C. § 2255. *Cf. In re John Paul Minarik*, 166 F.3d 591, 609 (3d Cir. 1999).

The government summarized this mass of materials in a five page response, separating the arguments emanating therefrom into "new" and "old" misconduct allegations, and addressed only petitioner's primary arguments. *See* Government's Mem. dated Feb. 17, 1999. While the court's initial impression, upon seeing that response, was that it was light — at least in terms of weight given the weight of the submission to which it was responding — it is clear now that, following the court's review of what petitioner presented in that weighty submission, not much more was necessary.

Thus, the forty-seven page rather rambling July 23, 1998 Declaration articulates suspicions, conjecture, and dramatic conclusions of governmental misconduct and even petitioner's innocence from phrases or sentences or inferences from those phrases or sentences, many innocuous in themselves and others plucked out of context. What can be no more than speculation — and weak speculation at that

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5. There are also a couple of brief and unavailing attempts to find other instances of trial counsel's ineffectiveness. *See e.g.*, Shevitz Decl. dated 7/23/98 at 14, 41, 43-44.

— becomes, in petitioner's hands, fact, and musings over possibilities seen in FBI 302's become *Brady* violations. When an FBI agent is, for the first time, listening to a tape of concededly poor quality in an attempt to familiarize himself with the voices and is unable to identify those voices, it becomes an "inconsistent and exculpatory 'interpretation' " — a "misidentification" — which should have been turned over to petitioner because it shows that the government's "theories were contrived." *See, e.g.*, Shevitz Decl. dated July 23, 1998 ¶¶ 24, 30. A videotape, which petitioner claims not to have seen, nonetheless "*strongly* supports his innocence." *See id.* ¶ 68 (emphasis in original). Two FBI 302's — one dated four days after Schiff's murder and the other dated one month after the murder — supposedly "show" that even after the "Newark case" had "landed" on the notion that the murder had been approved by petitioner and was an organized crime "hit," other members of the FBI stated that the murder was only "possibl[y] LCN related." *See id.* ¶ 60. Ignoring the fact that petitioner was not "landed" on nearly that early, "the FBI *doubts* at this time further show that the Newark prosecution was unfair!" *See id.* (emphasis in original). And, of course, the redactions seen in the wealth of material received by petitioner under FOIA are given a lot of attention because they "are largely *arbitrary*, and in all cases 'nip' in the 'bud' the exculpatory information that shows when, by chance, the responsible officer has left a tidbit of information." *See id.* ¶ 62. (emphasis in original)

The court's particular favorite is what petitioner tries to do with the statement of Special Agent Mullaney that "neither a photograph of DeSciscio nor a photo spread containing DeSciscio's photograph was presented to Ms. Lewis".

Appendix B

Mullaney Aff. dated June 15, 1998 ¶ 3 attached as Exh. A to Government's Mem. dated June 16, 1998. Petitioner starts off on the wrong foot by stating that the court "directed" the prosecutor to find information concerning the photo spread. Shevitz Dec. dated July 23, 1998 ¶ 35. It did not. Petitioner then assumes, based on nothing, that unidentified others gave Mullaney the information and, thus, his statement is hearsay. Even if, petitioner continues, hearsay was acceptable, "there is reason to doubt," again based on nothing, that those others had the correct information concerning what was shown. *See id.* at ¶ 36. "Further inquiry is required as to other agents involved" and "a hearing should be held to determine the true facts[.]" *See id.* "That Agent Mullaney does not know that any photo spread was shown is not sufficient." *See id.* at ¶ 38. But Agent Mullaney *does* know. A photo spread was not shown and, at the risk of repetition, there is no evidence to the contrary.

This and other examples too numerous to mention much less discuss underscore the fact that what petitioner is seeking, assuming that this court does not grant his primary request and on reconsideration summarily grant the petition, is, for starters, a full scale review of the entire investigation which preceded his indictment, following broad discovery which will include, but not be limited to, turnover of the videotape which "*strongly* supports his innocence," the original wiretaps, parts — or the whole — of investigations in various unrelated and/or irrelevant cases in New York, and copies of the mass of documents disclosed under FOIA with "far fewer redactions" or, "at the very least," unredacted copies of all of the documents for the court to review

in camera. *See*, *e.g.*, *id.*, ¶¶ 58, 68, 69, 71. In a nutshell, petitioner wants to go on a fishing expedition for even more information. *See*, *e.g.*, *id.* ¶ 55 ("[Y]et another issue is suggested by [one] disclosure — which is, whether the *original* tapes from Newark were in fact sent to the New York office and, if so, where the *un*sealing orders were (something else that the prosecutor ought to explain and which is ripe for a hearing)") (emphasis supplied). And so it goes.

This court will ignore the suspicions, the conjecture, the flights of fancy, the rhetoric and the understandable desire to keep looking in hopes that something will stick. Rather, this court will accept the government's division of petitioner's arguments into "new" and "old" misconduct allegations and will address only what appear to be the primary arguments, albeit fairly briefly, because they are arguments with little, if any, substance.

The "old" allegations first. As to the photo spread issue, petitioner had bemoaned the fact that the government submitted "only the statement of FBI Special Agent John Mullaney" that no photo spread was ever presented to Ms. Lewis. *See id.* ¶ 35. That response, petitioner argued, was "insufficient". *See id.* ¶ 36. Aside from the fact that the only support for petitioner's claim that Ms. Lewis was shown a photo spread is his mischaracterization of the 302 which merely says that a photograph of DeSciscio was provided to the New York City Police Department "so that a photospread could be shown to a witness in the Irwin Schiff investigation," the government has submitted two additional affidavits which

corroborate that of Mullaney.[6] Special Agent Damon Taylor states that no photograph of DeSciscio or photo spread containing his picture was ever shown to Ms. Lewis or to any other witness. *See* Taylor Aff. dated Feb. 12, 1999 ¶ 4, attached as Exh. A to Government's Mem. dated Feb. 17, 1999. Importantly, Ms. Lewis herself states that "at no time was I ever shown a photograph of the man I saw standing in the hallway of my building on the night of August 8, 1987, a photo spread containing a photograph of this man, or any other photograph or photo spread." Lewis Aff., Feb. 10, 1999 ¶ 5, attached as Exh. C to Government's Mem. dated Feb. 17, 1999.

The other "old" misconduct argument is nothing more than a resurrection of the argument addressed to the nondisclosure of information Remo Franceschini supposedly gave to the New York City Police Department, an argument disposed of in this court's earlier opinion. *See* Op., Jan. 29, 1998 at 22-27. In a nutshell, petitioner adds only that because of the "close working relationship" between the New York City police department and between "New York and Newark," "any suggestion that Detective Franceschini's information was not shared is further suspect-or, if it was not shared, purposeful withholding is implicated." Shevitz Decl. dated March 20, 1998 ¶ 3. Franceschini, who petitioner,

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6. Petitioner relegates to one sentence and, thus, does not seriously press two documents supposedly "showing that photos *were* shown to someone." *See id.* ¶ 36. (emphasis in original) Photos of who? Shown when? To whom? For what purpose? Nothing in these documents even hints that the "showing," of those photographs had anything to do with petitioner and his colleagues or even with the Schiff murder. *See id.* attached at Exh. D.

presumably in an unguarded moment, earlier accused of "obfuscation of the truth," Shevitz Reply Decl. to Gov't.'s Ans. ¶ 5, continues to refuse to provide an affidavit to either party in this action.[7] Moreover, there is no reference to him or anything he supposedly disclosed to the New York City Police Department in the Department's Schiff homicide file, a file this court reviewed, and, thus, nothing to turn over. In any event, it is undisputed that the information he supposedly disclosed had appeared in *Newsday* in November 1987. This court's opinion relegated the Franceschini argument to the ash heap in which it belongs and, remembering that what is before this court is a motion for reconsideration, that argument is surely not a matter which this court "has overlooked." *See* Local Civ. R. 7.1(g).

The "new" allegations of government misconduct are, at bottom, two in number. The first concerns an FBI investigation beginning in about 1987 into approximately nine unsolved murders — the ".22 Calibre Murders" — committed between 1977 and 1987 and their connection, if any, to the Genovese Family hierarchy and Vincent "Chin" Gigante. The investigation also attempted to determine whether the then-unsolved Schiff murder and the nine other unsolved murders could be used as a predicate acts in a potential RICO prosecution against the Genovese hierarchy and Gigante in New York. *See* Taylor Aff. dated Feb. 12, 1999 ¶¶ 2, 3, attached as Exh. A to Government's Mem. dated Feb. 17, 1999; *see also id.*, Exh. B. Following a two

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7. In spite of Franceschini's "obfuscation of the truth" and his refusal to provide an affidavit, counsel states, presumably with a straight face, that his information was "reliable enough . . . to be admitted even at a trial[.]" Shevitz Decl. dated July 23, 1998 ¶ 52.

year investigation, the FBI concluded that there was insufficient evidence that the nine unsolved murders were interrelated or ordered by the Genovese hierarchy and Gigante. Neither the November 2, 1989 302 which memorialized that fact (and to which petitioner points as exonerating him) nor the nine unsolved murders had anything to do with the murder of Schiff or call into question the conclusion of the FBI — and the jury in this case — that petitioner sanctioned that murder. *See id.* ¶ 5. Indeed, June 28, 1989 and September 8, 1989 302's specifically state that the Schiff murder was apparently sanctioned by the Genovese hierarchy. *See* Exh. B. to Government's Mem. dated Feb. 17, 1999. Petitioner goes nowhere with this allegation of "misconduct."

The other primary "new" allegation has been alluded to earlier. Essentially, petitioner suggests that one or more New York FBI agents listened to five of the August 1987 tapes, and particularly the important August 5th tape, and failed to identify the speakers. This information, petitioner concludes, should have been turned over. But, averred Special Agent Taylor, there could not have been voice identifications or comparisons given that no one who reviewed the tapes "'was even remotely" familiar with any of the voices thereon, including the voice of petitioner. *See* Taylor Aff. dated Feb. 12, 1999 ¶ 3 attached as Exh. A to Government's Mem. dated Feb. 17, 1999. Indeed, the agent who was the author of the January 5, 1988 302 to which petitioner particularly points stated that he listened to the five taped conversations "to familiarize himself with voices and also to listen to different voice fluctuations, possibly giving some idea as to individual feelings regarding the [Schiff] killing, and also any other

voice clues possible." *See id.* at Exh. B. After listening to the August 5th tape, the agent concluded that "unknown male[s] number 1 and 2 have already decided, in their minds, what they want done regarding SCHIFF" and met with co-defendant Martin Casella. It is "quite possible" that the unknown males were "outside of MANNA's specific group of cronies, that hang out at CASELLA's." *See id.* This is the smoking gun which should have been turned over. Wrong. This uneducated conjecture is not *Brady* under the most liberal interpretation of that case. Parenthetically, petitioner does not mention the next paragraph of that 302 in which the agent describes a loud and clear conversation on August 10th between Casella and someone whose name has been redacted from the 302 in which the latter states that " 'Bobby' picked this kid (the shooter) out." *See id.*

Petitioner sought leave to respond to the government's response and, in what turned out to be another weak moment, the court granted leave to do so, but restricted petitioner to five pages. A five page letter memorandum dated March 19, 1999 was thereafter submitted — single spaced, tiny type, and narrow margins on all four sides — together with a "Declaration Seeking Leave to to [sic] Submit Back-Up to Response to Government's Submission of Taylor Affidavit and February 17, 1999 Letter-Memorandum" and 75 pages of back-up documents because, the cover letter noted, "[f]actual back-up could not be accomplished in the five pages to which you limited us[.]" Also on March 19th, petitioner sent a copy of the package to the Clerk's office for filing, apparently not willing to await this court's action on his application for leave to submit the back-up materials. The Clerk filed the Declaration and attached back-up

materials, but, consistent with this court's rules, did not file the letter memorandum. This prompted a letter from petitioner's counsel to the court, dated March 29, 1999, asking why petitioner's memorandum and the government's memorandum to which it responded had not been filed. By letter dated April 7, 1999, the court advised counsel that letter memoranda are not filed.

This did not deter counsel. On April 13, 1999, counsel wrote to the Clerk of the Court and enclosed for filing a "Declaration in Opposition to Government's February 17, 1999 Letter-Memorandum with Sworn Statements Attached and in Support of Docketing Said Submission and Petitioner's Response." To this Declaration was attached petitioner's memorandum, the government's memorandum, the affidavits of Special Agent Taylor and Ms. Lewis, various 302's, counsel's letter to the court of March 29th and the court's letter of April 7th. Presumably because of the label, the Clerk filed the "Declaration" and, thus, petitioner managed to sneak in via the back door what he had been told by the court he could not do via the front door. The Clerk of the Court will be directed to delete the memoranda and the letters from the Declaration of April 13, 1999.

Finally, the court will address, albeit briefly, the five page letter memorandum — that "single spaced, tiny type, and narrow margins on all four sides" document — and the accompanying Declaration with its 75 pages of back-up material which counsel for petitioner sought leave to file and, without leave, filed anyway. If anything should be clear by now it is this: this court has bent over backwards in accepting the reams of material submitted by petitioner.

It has done so in spite of the fact that, among other things, counsel has ignored this court's rule as to page length both in the petition and petitioner's reply to the government's answer to the petition, and has ignored this court's rule that "ordinary" type font and not smaller type font be used in his March 19th memorandum. *See* Local Civ. R. 7.2(b). More importantly, counsel has ignored this court's rule, and the ample case law supporting that rule, concerning what is and is not permissible in an affidavit (or a declaration). *See* Local Civ. R. 7.2(a).[8] Thus, counsel has used her numerous declarations, to which she has tacked on everything but the kitchen sink, almost without exception as briefs, replete with summations, rhetoric, hearsay, speculation and conclusions, with the most egregious example being the forty-seven page fighting Declaration of July 23, 1998. Moreover, every one of the numerous declarations is virtually bereft of anything of which counsel has or could have personal knowledge. Parenthetically, counsel was clearly aware of the personal knowledge requirement given her statement of ¶ 3 of her Declaration of April 13, 1999 that her five page letter memorandum, which she attached to the accompanying Declaration and filed, is "a sworn statement concerning matters in the record of which I have personal knowledge." Not surprisingly, not only was the letter memorandum not

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8. Local Civ. R. 7.2(a) provides:

> Affidavits shall be restricted to statements of fact within the personal knowledge of the affiant. Argument of the facts and the law shall not be contained in affidavits. Legal arguments and summations in affidavits will be disregarded by the Court and may subject the affiant to appropriate censure, sanctions or both.

sworn, but in almost all respects her representation of personal knowledge was belied by what is in the memorandum.

The memorandum, certainly shrill in tone, spends most of its time responding to Special Agent Taylor's statement that no member of the C-6 Squad who listened to the tapes was even remotely familiar with the voices and, thus, no identification of petitioner's voice by those agents was possible. Counsel takes this statement and proceeds to discuss a handful of instances — supported by the bulk of the "back-up" materials attached to the Declaration — when, with reference to various cases in New York, petitioner had conversations with one or more FBI agents and with Vincent Cafaro. Then, misreading Taylor's statement to say that no voice identifications were possible by anyone, any place, counsel concludes that Taylor's statement was "shamefully false" — a "dishonest submission." Pet. Mem. dated March 19, 1999 at 1, 3. Counsel moves on to discuss a supposedly illegal wiretap in another case in New York — again with a raft of back-up materials — in which the government allegedly misled the judge and covered up its wrong doing. "*All* this cries out for relief." *See id.* at 3 (emphasis in original).

But there is more. Counsel turns her sights to Franchesini, excoriating the government for dragging its heels and missing the essential point that even if Franchesini had given his information to one of the detectives conducting the Schiff investigation, and Franchesini refuses to say under oath that he did, there is, for starters, no hint of that in any relevant file which the government and/or the court has reviewed or that anyone who had anything to do with this

case, even as most broadly defined, is willing to say. Under *Brady*, it is, after all, "available and accessible" information which must be disclosed. *See Hollman v. Wilson*, 158 F.3d 177, 180, n.4 (3d Cir. 1998), *cert. denied*, __ U.S. __, 119 S.Ct. 1035 (1999). Counsel goes on to take Taylor to task for calling the nine unsolved murders "the .22 caliber murders" when counsel "know[s] for a fact that one did not involve .22 calibre bullets and [counsel] read that another did not in 'an old newspaper article.' " *See id.* at 4. So what? And, finally, now seemingly satisfied that Ms. Lewis was not shown a photo spread, counsel for the first time argues that the "agents instead orchestrated a suggestive show-up — a technique known to result in mistaken identifications." *Id.* Too little, too late — this is, after all, a motion for reconsideration. That aside, Ms. Lewis was extensively cross-examined at trial on this very point and defense counsel came up dry. The remainder of the memorandum does little more than rail against the government and the court and will not be further discussed.

While this court has considered, and rejected, the arguments in the memorandum, the accompanying Declaration with the appended seventy-five pages of back-up materials will be struck. Petitioner, on this last go-around, was given leave only to submit a five page memorandum, not to file extensive materials which, apart from the spin he would put on them, are either irrelevant to the issues before the court or add nothing new.[9] Enough is enough.

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9. The court has little doubt that if those materials had any real relevance to the *Brady* and ineffective assistance claims it would have erred on the side of caution one more time. They do not. The

(Cont'd)

Appendix B

Returning to where the court began, this is a motion for reconsideration of an opinion and order of the court which concluded that petitioner did not receive ineffective assistance of counsel at trial and that there had been no *Brady* violation. The proper subjects of a motion for reconsideration are "the matters or controlling decisions which counsel believes the Judge . . . has overlooked." Local Civ. R. 7.1(g). The few claimed instances of such issues have now been addressed, although the court had not "overlooked" those issues on the first go-around, choosing, rather, not to address them at all given their lack of merit. *See* n.2, *supra* at 2-3. The remainder of petitioner's submission, and by any measure the vast bulk of that submission, is material petitioner had or could have had on the first go-around or after-acquired information received in response to his FOIA

(Cont'd)
materials include the 1987 affidavit of Special Agent Damon T. Taylor in *United States v. Tutino*, (S.D.N.Y.), the 1987 affidavit of former prosecutor Warren N. Eggleston in *United States v. Salerno* (S.D.N.Y.), wiretap logs from 1985 in another New York case, the 1999 affidavits of two attorneys who represented petitioner in the 1970s and/or the 1980s, and the 1999 Declaration of petitioner — all to show that petitioner talked to certain FBI agents and Cafaro in the past and, thus, his voice could have been identified. Petitioner's Declaration also claims that the government in 1986 in a New York grand jury matter illegally wiretapped him and he submits a host of documents addressed to that claim — letters, an application for a pen register and the court order authorizing same, a subpoena, and an advice of rights form, among other documents. Copies of some of the FOIA material previously submitted are resubmitted, now addressed to the .22 caliber "issue"; and the two Newsday articles concerning the Castelli murder, which this court had before it at the outset, reappear.

requests and loosely argued as supporting his *Brady* claim and, to an almost nonexistent extent, his ineffective assistance claim.

To have considered this material at all is to have relaxed the strictures of Rule 7.1(g) to the point where they are virtually unrecognizable. That having been said, however, nothing in the material warrants favorable action on this motion. "[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense." *See Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995). And even if there was a violation of *Brady* lurking somewhere in this massive submission, and this court certainly has not seen it, a new trial will only be granted if petitioner demonstrates both a withholding of exculpatory evidence by the prosecution and that the evidence is material such that it could be said that, because of its absence, petitioner did not receive a fair trial. *See United States v. Pelullo*, 105 F.3d 117, 122 (3d Cir. 1997). In other words, petitioner must show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *See Kyles*, 514 U.S. at 435. Petitioner has not come close. Neither has he come close to showing that "counsel made errors so serious that [he] was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Indeed, in his extensive submission on this motion for reconsideration, petitioner has, for practical purposes, left counsel alone and, certainly, untouched.

Appendix B

The motion for reconsideration is denied. An appropriate order will issue.

s/ Maryanne Trump Barry
MARYANNE TRUMP BARRY
U.S.D.J.

Dated: August 3rd, 1999

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action
No. 97-2034 (MTB)
(Crim. No. 88-239 (MTB))

LOUIS ANTHONY MANNA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER

This matter having come before the court on petitioner's motion for reconsideration; and the court having reviewed the submissions of the parties without oral argument pursuant to Fed. R. Civ. P. 78; and consistent with this court's opinion of even date;

IT IS on this 3rd day of August, 1999,

ORDERED that the Clerk of the Court delete from the April 13, 1999 Declaration of Vivian Shevitz the memoranda and the letters contained therein; and it is further

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ORDERED that the Clerk of the Court remove the March 19, 1999 Declaration of Vivian Shevitz from the file; and it is further

ORDERED that petitioner's motion for reconsideration be and hereby is denied; and it is further

ORDERED that petitioner's motion for certificate of appealability be and hereby is denied.[1]

s/ Maryanne Trump Barry
MARYANNE TRUMP BARRY
U.S.D.J.

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1. A certificate of appealability may only issue if "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner has not done so.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED FEBRUARY 27, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-5131

District Court No. 97-cv-02034

USA

vs.

Manna

ORDER

It appearing that a timely post-decision motion of a type specified by Fed. R. App. P., is pending in the district court, it is hereby ORDERED that the above-entitled appeal(s) is(are) stayed pending disposition of the motion. The parties are directed to file written reports addressing the status of the pending motion on 3/30/98 and every thirty (30) days thereafter until the motion is dete[illegible]ned.

This stay does not apply to the obligation to pay filing and docketing fees. These obligations must be fulfilled within the time specified by the Federal Rules of Appellate Procedure and Third Circuit Local Appellate Rules.

For the Court,

s/ P. Douglas Sisk
P. DOUGLAS SISK, Clerk

Date: 2/27/98

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND FILED JANUARY 29, 1998

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action
No. 97-2034(MTB)

LOUIS ANTHONY MANNA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

OPINION

BARRY, District Judge

Eight and one-half years ago, following a trial which lasted four months, a jury convicted petitioner, Louis Anthony Manna, alleged in the indictment to be the Consigliere of the Genovese Family of LaCosa Nostra and head of the Manna faction of the Genovese family. Petitioner was convicted of RICO substantive and conspiracy charges — the predicates of which included conspiracies to murder Irwin Schiff, John Gotti, and Gene Gotti — as well as labor payoffs and the operation of an illegal gambling business.

Appendix D

On September 26, 1989, this court sentenced petitioner to an aggregate term of imprisonment of 80 years and a $250,000 fine. His conviction, and those of the five co-defendants with whom he went to trial, was affirmed by Judgment Order of the Court of Appeals for the Third Circuit dated November 21, 1990. 919 F.2d 733 (3d Cir. 1990) (table) (Seitz, Sloviter and Scirica, J.J.). His petition for a *writ of certiorari* was subsequently denied. 499 U.S. 949 (1991).

This petition, while a long-delayed aftermath of his indictment and conviction, has been brought, pursuant to 28 U.S.C. § 2255 and § 2241, within the one-year grace period which most courts, including this one, have been affording petitioners whose convictions had become final before the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, 110 Stat. 1217 (1996) and, thus, is timely.[1] For the reasons which follow, because the petition, files, and records of this case conclusively demonstrate that petitioner is not entitled to relief, the petition will be dismissed without a hearing.

The petition itself and petitioner's reply to the government's answer total 93 pages, and are accompanied by a host of exhibits. Culled to its essence, petitioner claims

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1. The petition was filed on April 21, 1997, barely making it in under the one-year wire. *Compare Peterson v. Demskie*, 107 F.3d 92, 93 (2d Cir. 1997) (holding that "where a state prisoner has had several years to contemplate bringing a federal habeas corpus petition, we see no reason to accord a full year after the effective date of the [Act]," but finding that a filing 72 days after the effective date of the Act was within a "reasonable time."

ineffective assistance by his trial counsel, Raymond A. Brown, Esq., and alleged misconduct by the police and/or the prosecution up to and including *Brady* violations. As to the claim of ineffective assistance, petitioner complains of virtually everything Mr. Brown did and everything he did not do, and argues what Mr. Brown should have done or what he should have done better. In essence, and not surprisingly, petitioner wants to try again. The misconduct allegations and/or alleged *Brady* violations are bereft of merit, referencing, as they do, three items which, in this court's view, were and are not material and would not have required disclosure even if they had been in the government's actual or constructive possession before or at the time of trial, at least one of which was not.

It is hornbook law, of course, that when an issue has been determined on direct appeal from conviction, a petitioner is thereafter precluded from urging the same issue in a later collateral attack. *See, e.g., United States v. DeRewal*, 10 F.3d 100, 105 n.4 (3d. Cir. 1993). The Judgment Order of the Court of Appeals lists the following issues as having been considered on direct appeal:

> 1. That the district court deprived appellant of a fair trial when it denied his motion to compel disclosure by the government of technical information necessary to effectively challenge the integrity of the electronic tape recordings and the reliability of the voice identifications;
>
> 2. That appellant was denied his right to compulsory process and a fair trial when the court

barred testimony by two unnoticed alibi witnesses, the significance of whose testimony was not previously apparent to defense counsel;

3. That the district court's refusal to charge the jury on the theory of defense was reversible error;

4. That appellant's convictions on counts 1, 2, 3, 4, 5, 7 and 26 must be reversed and those counts dismissed because the evidence was legally insufficient to support them;

5. That imposing consecutive sentences on each count of which appellant was found guilty violated the double jeopardy and due process clauses; and

6. That the alleged errors identified by appellant Martin Anthony Casella, appellant in No. 89-5822, appellant Rocco J. Napoli, appellant in No. 89-5824, appellant John Derrico, appellant in No. 89-5825, and appellant Frank Daniello, appellant in No. 89-5826, require reversal of the conviction of appellant Manna. . . [2].

Gov't. Exh. 5.

Lengthy as this case was, it was concededly a tape case, pure and simple. Thus, if the jury accepted the government's

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2. It is impossible to know from the Judgment Order what additional errors were unsuccessfully pressed by petitioner's co-defendants.

position as to what was said on the tapes and by whom, as it did, it should have convicted; conversely, if the jury did not accept the government's position, it should have acquitted. It is, therefore, fair to assume that most or all of the issues addressed in this petition to the tapes and tape transcripts were raised to the Court of Appeals in support of petitioner's argument that "the evidence was legally insufficient." Given that he cannot again raise *in haec verba* the issues raised on direct appeal, petitioner — as all petitioners in the same position are now doing — has, wherever possible, clothed those issues in the trappings of ineffective assistance of counsel,[3] the issue to which this court will first turn its attention.

I. *Ineffective Assistance of Counsel*

In all of the many pages petitioner now presses on the court, and while in one moment of frenzy, petitioner goes so

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3. One example will suffice. While petitioner complained on direct appeal that this court "barred testimony by two unnoticed alibi witnesses, the significance of whose testimony was not previously apparent to defense counsel," he now complains not of the court's action but of counsel's inaction which he alleges was ineffective assistance. These two witnesses, petitioner's sister-in-law and niece, were supposedly called by petitioner from a birthday party his "companion" and his daughter testified he had attended. The phone records, it is urged, would prove this. Petitioner's "alibi," however, came into evidence through his companion and his daughter, and the phone records would have shown only that someone at the party, and not necessarily petitioner, placed the calls. Ineffective assistance is simply not evidenced by counsel's decision not to call two additional, duplicative, and wholly impeachable witnesses. *See* n.6, *infra*.

far as to state that "As a matter of *justice*, what went on at this trial was worse than the murder of Irwin Schiff!" (Decl. of Vivian Shevitz in Reply at ¶ 38), at no point does petitioner raise any real complaint as to *any* of the government witnesses or of *any* action taken or not taken by the court. Rather, he lays all of his complaints at counsel's feet, prompting the court to wonder where petitioner has been lo these eight-and-one half years and, given the lengthy delay, whether he is really serious about what he alleges. After all, according to him, he knew of those complaints at the time of trial and made not a peep, until now.

Putting the occasional shrillness of petitioner's submissions aside, and rejecting his continual characterization of even the smallest thing that was not perfection as a grave constitutional violation, petitioner has done a yeoman's job in combing approximately 55 volumes of trial transcript covering well over 10,000 pages plus hundreds of tapes and other exhibits. But yeoman's job aside, there are glaring omissions in petitioner's presentation which call for comment at the outset.

Omission Number One. Petitioner merely pays lip service to the reputation of his supposedly ineffective counsel. Pet. ¶9. That reputation cannot be so easily dismissed. Raymond A. Brown, Esq., is and has been for many years universally recognized as one of the leaders of the criminal defense bar in the State of New Jersey. This is no lightweight, this is no novice. This is a man who, in case after case, year after year, pours his guts out on behalf of his clients and renders, in case after case, year after year, superb representation. And petitioner himself is no lightweight, no

novice; indeed, if one accepts the defense portrayal of him, he was, at least until his conviction, an intelligent and sophisticated businessman. This intelligent and sophisticated businessman reached out for the best attorney he could get, and he got him in Mr. Brown.

Omission Number Two. Petitioner fails or refuses to recognize that five skilled and sophisticated defense attorneys represented the five co-defendants at trial and presented, with Mr. Brown, a coordinated defense. That defense saw 56 witnesses testify, including alibi witnesses and two voice identification experts, and saw defense transcripts, which said whatever defense counsel and petitioner wanted them to say, received into evidence over the government's strenuous objection.

A word about the voice identification experts, and a word about the transcripts, with more to be said later. There was a third expert, Dr. Henry Truby, who petitioner now alleges should have been called in place of "expert" Thomas Owens, who was destroyed on cross-examination. But six sophisticated defense counsel and a sophisticated petitioner knew what Dr. Truby would say and elected not to call him, a conscious, tactical decision. Moreover, given the volume of paper filed by petitioner on this application and the intensity with which the Truby issue is pressed, it is worth noting what petitioner does *not* note, i.e. had Dr. Truby been used, petitioner could not have used Dr. Peter Ladefoged, the other expert, of whom petitioner does not in any way complain. And, as to the transcripts, as the tough-to-understand tapes were being played, the jury had the government's version and the defense version of what was

being said before it, even though no foundation had been laid for admission of the defense version. This sophisticated defense team got more than it was entitled to get to the jury.

In the face of all of this, and more, it defies belief that petitioner is alleging ineffective assistance of counsel. It is very easy, of course, to sit back and, with the luxury and distorting effects of hindsight and eight and one-half years within which to nit-pick to death a four month trial and all that went before, lay everything that could possibly have contributed to petitioner's conviction at counsel's feet in hopes of doing it over. The Court in *Strickland v. Washington*, 466 U.S. 668 (1984), recognized this fact and directed courts, when deciding an ineffective assistance claim, to "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. In this connection, the court recalls its observation *at* trial, albeit while addressing a discrete issue, that "this has been one of the most carefully prepared defense cases I've ever seen." Vol. 50, June 6, 1989, at 110.[4]

The *Strickland* Court announced a rigorous if not altogether daunting test to be applied when assessing a claim of ineffective assistance of counsel.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel

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4. When reminded by the government of this observation, petitioner responded, "this court obviously did not know at that time, what a *real* defense could have looked like." Decl. of Vivian Shevitz at ¶ 65.

> was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687. With reference to the first prong of this two-pronged test, counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

It is important to stress, as the *Strickland* Court stressed, that tactical or strategic decisions cannot be second-guessed years later unless those decisions are "unreasonable." *See id.* at 690; *Diggs v. Owens*, 833 F.2d 439, 444-45 (3d Cir. 1987), *cert. denied*, 485 U.S. 979 (1988) ("An attorney is presumed to possess skill and knowledge in sufficient degree to preserve the reliability of the adversarial process and afford his client the benefit of a fair trial. Consequently, judicial scrutiny of an attorney's competence is highly deferential."). Accordingly, the mere fact that a tactic or a strategy might have been unsuccessful does not necessarily indicate that it was unreasonable. *Id.* at 689.

Appendix D

In determining whether a certain tactical or strategic decision was unreasonable, courts are permitted to refer to the American Bar Association Standards as a guideline. *Id.* at 688; *see also Government of the Virgin Islands v. Weatherwax* ("*Weatherwax I*"), 20 F.3d 572, 579 (3d Cir. 1994), *rev'd on other grounds*, *Government of the Virgin Islands v. Weatherwax* ("*Weatherwax II*"), 77 F.3d 1425, 1435 (3d Cir.), *cert. denied*, __ U.S. __, 117 S.Ct. 538 (1996). One of the most relevant standards in this context is the ABA Standard for Criminal Justice ("ABA Standard") 4-5.2 (3d ed. 1993), "Control and Direction of the Case." This section dictates which decisions are ultimately to be made by a defendant, and which are to be made by defense counsel. Specifically, tactical and strategic decisions such as which witnesses to call, whether to conduct cross-examination, and what motions to make at trial are within the province of the attorney after consultation with the client. ABA Standard 4-5.2(b). The Commentary to that section further states that, when the attorney in question has made such tactical or strategic decisions, "[o]nly when [his or her] behavior revealed ineptitude, inexperience, lack of preparation or unfamiliarity with basic legal principles [will these] actions amount to ineffective assistance of counsel." *Weatherwax I*, 20 F.3d at 579 (citing commentary at 4.67-68). Therefore, if a decision falls within the realm of a tactical or strategic decision to be made by the attorney, the court will find that decision deficient *only* if the attorney either failed completely to consult with his or her client, or if the decision was itself inept or incapable of sound interpretation. As discussed throughout this opinion, this court can make no such finding.

Appendix D

Much — indeed, most — of petitioner's submission is the mantra that the government's identification of the words and speakers on the tapes was wrong, with various reasons posited as to why he believes that to be so. Correctly predicting that "the court may find itself grimacing at this suggestion" (Pet. ¶ 6), petitioner states that he was only on one tape, i.e. the August 18, 1987 tape, on which he and his brother were supposedly discussing cooking chicken with or without garlic. Not only was he not on the other tapes, he continues, they were not even about him. Pet. ¶ 5. Parenthetically, to the extent that this is an insufficiency of evidence argument in this tape case, it was rejected by the jury and the Court of Appeals.

But, of course, this insufficiency of evidence argument is now clothed in ineffective assistance of counsel trappings, with petitioner raising everything but the kitchen sink. Some examples will suffice. Petitioner complains, for example, that Mr. Brown should have investigated members of the Kiwanis Club who, unlike petitioner, were *real* participants in the November 19, 1987 tape. So, too, he claims that Messrs. Roman, Petrizzo, and Smith should have been called by Mr. Brown rather than the witnesses he did call because they, again unlike petitioner, were on the August 5, 1987 tape, a fact that Mr. Brown could have confirmed with spectrograms.[5] Of course, the portion of that tape on which

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5. Mr. Roman, at ¶ 9 of his Declaration, Exh. C to Pet., notes in passing that he "spoke to [petitioner] only recently in connection with providing this information concerning my own voice." One must wonder whether he and his friends also "spoke" to petitioner at or about the time of trial. If so, that would have been a sufficient reason in and of itself not to call them as witnesses.

the three men supposedly appeared was not played by the government or the defense and there was utterly no reason to call them.[6]

Petitioner complains, moreover, that Mr. Brown called Thomas Owens as an expert instead of Dr. Henry Truby, but barely notes and does not take issue with the fact that Dr. Peter Ladefoged was also called and testified at great length that he did not hear petitioner on virtually any of the tapes and, in certain critical areas, did not hear words the government claimed were on the tapes — which, of course, is precisely what Mr. Owens had said.[7] Not surprisingly, petitioner does not provide an affidavit of Dr. Truby who, conveniently, is now deceased.

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6. It bears repetition that the decision of which witnesses to call to testify is "strategic" and, therefore, left to counsel. *See* ABA Standard for Criminal Justice 4-5.2; *Diggs*, 833 F.2d at 446. Attorneys are not required to call every witness suggested to them; their expertise leads them to choose only the witnesses likely to assist the case. *United States v. Balzano*, 916 F.2d 1273, 1294 (7th Cir. 1990); *see also United States v. Griffen*, 1993 WL 34927 (E.D. Pa. Feb. 9, 1993), *aff'd*, 16 F.3d 406 (3d Cir. 1993).

7. It is this court's recollection that Dr. Ladefoged did not escape cross-examination unscathed. Among other things, he was reminded on cross that in a previous case he had been unable to identify the voice of his own mother. One of the difficulties with a petition as long delayed as this one has been is that recollections fade somewhat and certain transcripts are unavailable. If it was not Dr. Ladefoged's mother who failed to make an impression on her son, then it was surely Mr. Owens's mother.

That aside, there is no way of knowing, of course, what would have happened to Dr. Truby on cross. One suspects, however, that it might not have been pretty if for no other reason than that his testimony would have resulted in a dispute between himself and Mr. Owens and/or Dr. Ladefoged. Dr. Truby supposedly prepared spectrograms of the August 5, 1987 and January 10, 1988 tapes which "confirmed" that petitioner was not the speaker. Both Mr. Owens and Dr. Ladefoged, however, testified that *all* of the tapes were too poor to do spectrographic analyses. It made eminent sense, as a tactical matter, to stress consensus as to the overall lack of quality of the tapes — which, after all, was, quite correctly, the focus of the defense — rather than supposed misattributions on two tapes — which the defense, in any event, argued ferociously in every way possible. The decision not to call Dr. Truby — if, indeed, it was Mr. Brown's decision at all — prevented a conflict between the experts as to whether spectrograms of these tapes could have even been prepared and, if so, whether they would have been reliable, an issue not at all free from doubt.

In any event, petitioner now has a new expert, retained in 1996, and a new investigator, both of whom have analyzed the tapes and, again not surprisingly, conclude that: the speaker the government identified as petitioner, aside from the one tape on which petitioner concedes it was him, was not petitioner but a variety of other people, including Messrs. Roman, Petrizzo, Smith, Napoli, and Verdi, *see* Exh. A, B, C, D, and E to Pet.; "Schiff" was "shift," as in work shift; and the conversations as described on the defense transcripts, while again reworked, remained innocuous in the extreme. And finally, in one of his more desperate arguments,

petitioner complains that the defense transcripts admitted at trial even *looked* like the government transcripts, conveying the notion, he suggests, that, the defense was not a serious one and that counsel was doing the least possible work, "horribly" prejudicing petitioner. Now, however, he has "real" transcripts (Pet. ¶¶ 58-61).

It is simply not the case that petitioner can do it over — differently — when, under his approving gaze, if not direction, the defense team struck out after presenting 56 witnesses and transcripts which, in this court's view, bore little or no relation to what was being said on the tapes and by whom, but which, if believed, would have wholly absolved petitioner of everything but participating in a discussion of cooking chicken. Vol. 35, May 3, 1989, at 35.27, 6980. That is not the way it works.

Some final observations on two of the supposed examples of ineffective assistance relating to the tapes. First, petitioner states that he wanted a *Starks* hearing, pretrial. Mr. Brown allegedly told petitioner that he would "cover it" at trial, and did not do so. This court will not second-guess that tactical decision. Indeed, the last thing petitioner would have wanted would have been for this court to have listened to the tapes and determined, among other things, that not only were they audible, but that the court's *imprimatur* should be placed on the government's version of the transcripts, which accurately reflected what the court heard, and, perhaps, on the speakers themselves. By not calling for a *Starks* hearing, the defense *had* a defense.

Appendix D

Petitioner also bemoans Mr. Brown's failure to make hearsay challenges to various portions of various tapes. The bulk of his complaints is addressed to the August 5, 1987 tape offered by the government to link petitioner to the Schiff murder. Aside, of course, from contesting who was speaking and what was being said, his primary complaints as to that tape — among a host of even more frivolous complaints such as an ex-detective who said that he believed that Genovese people would not have referred to Schiff as "CC," Pet. ¶ 82, itself classic hearsay — are that: an "unknown male" was one of the speakers on the tape; there was no way of knowing whether the "unknown male" was a conspirator; there was no evidence *aliunde* that the "unknown male" and petitioner were in the same conspiracy; and the statement, in an event, was not in furtherance of the conspiracy. Pet. ¶¶ 21, 76-88. But the very statement about which petitioner complains makes crystal clear that the declarant was a member of the conspiracy and that the statement was in furtherance thereof. Moreover, the cases petitioner cites to support his entitlement to proof *aliunde*, cases which in his reply he chastises the government for not addressing, all pre-date *Bourjaily v. United States*, 483 U.S. 171, 178-81 (1987). *Bourjaily*, as relevant to the proof *aliunde* argument and what flows therefrom, looked at the plain language of F.R.Evid. 104(a) and changed what, in most courts, had gone before.

The complaints that are not addressed to the tapes and transcripts are, for the most part, pure bologna, as a smattering of them should illustrate. Petitioner complains, for example, that there was an error at page 33 in the affidavit for a Third Consolidated Wiretap Extension wherein it was stated that petitioner owned two pieces of property in West

Palm Beach when he did not. Mr. Brown, it is alleged, never followed up on this. Although the question of whether or not petitioner owned property *any* place was not an issue in the case, this alone, according to petitioner, is "a constitutional violation[ ] warranting the Writ." Pet. ¶ 94. Wrong. Along the same lines, petitioner complains that, apparently in the same affidavit, it was stated that one Janet Mastrogiovanni was "probably" related to petitioner through marriage (Pet. ¶¶ 108-110) and Mr. Brown should have followed up on this as well to show government misconduct. Really? And to the extent that petitioner argues that in his pretrial motions Mr. Brown should not have focused, as he did, on the lack of probable cause for issuance of the wire taps rather than "real" defects such as the above (Pet. ¶ 45), this court has every confidence that were Mr. Brown to have done just that, it would now be hearing that it was ineffective assistance *not* to focus on the lack of probable cause.

And, finally, for this is as far as this court will go, petitioner complains that Mr. Brown "seemingly" (Pet. ¶ 96) lost some tapes made of government witness Vincent Cafaro by Cafaro's family and given to Mr. Brown to impeach Cafaro. Mr. Brown impeached Cafaro — devastatingly — with one of those tapes, a tape in which Cafaro was explaining to his wife how he had been visited in jail by his dead mother. Relevance is claimed as to only one of the supposedly "lost" tapes (*see* Exh. T to Pet.), relevance clearly lost on the court.

Some final observations must be made. This court has yet to see a case of which it could more truly be said that the cold record did not because it could not convey certain

devastating moments in the trial, the control petitioner continually exerted over the defense, and the incredible dynamics of the trial itself. One would have had to be there to understand, for example, that although this was a well-orchestrated defense with counsel for all six defendants actively involved, the orchestra was led not by Mr. Brown or any other defense attorney but by petitioner himself. One would have had to be there to understand how fiercely Mr. Brown fought for his client. To say, for example, as petitioner says at ¶ 132 of the petition, that Mr. Brown's summation was "weak," displayed an "attitude of resignation," and was "hardly the summation of a fierce advocate," was simply not so. Mr. Brown was a pitbull in summation, stalking the courtroom, snarling about what was wrong with the government's case, and fighting for his client with everything that was in him. And for petitioner to cast aside so cavalierly the surgery Mr. Brown so effectively performed on cross-examination of so many of the government's witnesses (Pet. ¶ 10) simply defies belief.

One would have had to be there to have seen the orchestra leader making changes in the ridiculous defense transcripts even as counsel was pressing for admission of those transcripts.[8] One had to be there to fully comprehend the

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8. Although, as noted earlier, it was clearly a coordinated defense, the issue of defense transcripts, i.e. whether they should be admitted and what would be required for admission, was pressed not by Mr. Brown but by one of his co-counsel (a fact petitioner does not note). In an opinion read into the record on that issue (Vol. 51, June 7, 1989, at 182-86), the court noted that time and time again defense counsel were put on notice what they had to do

(Cont'd)

impact on the jury when defense witnesses were destroyed on cross-examination, as many were, most particularly Mr. Owens, whom even petitioner concedes was "decimated" on cross. Pet. at ¶ 37. One had to be there as Mr. Owens played over and over again a looped tape of a portion of the critical August 18, 1987 conversation in an attempt to convince the jury to hear "with the chicken" and "hold the garlic" rather than, as the government was urging, "that guy with the chick is a Gambino." Vol. 35, May 3, 1987, at 6979. The looping exercise did not, to say the least, go smoothly, and the one word heard over and over again, at least by the court, was "Gambino," "Gambino," "Gambino. . . ."[9]

And, of course, one had to be there to have appreciated the impact of what, in the court' s mind, was one of the most devastating moments in the trial. In the third month of trial,

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(Cont'd)
to lay the foundation necessary for the admission of the transcripts. Each time they indicated they understood, but because they were either unable or unwilling to lay the requisite foundation, they did not even try. Parenthetically, it could well be argued that the last thing the defense wanted was for their transcripts to be admitted, not only because they were such a sham but, more importantly, as the court observed in its oral opinion, without them the defense could point to the unfairness of admitting the government's version alone. *Id.* at 185. The court noted as well that having heard the tapes and comparing what it heard to the two versions, it was not surprised that it was not called upon to resolve discrepancies between the two versions. *Id.* at 185-86.

9. Continuing the food theme, Mr. Owens testified that on the August 10, 1987 tape, the government's "stone killer" was really "stone crabs." *Id.* at 7001.

following weeks of tapes being played by the government and the defense, voices on the tapes being attributed to various persons, including petitioner, and the defense on cross and on its case attempting to show that a particular voice was not, as urged by the government, that of petitioner, petitioner called his brother, Dominick Manna, essentially to testify that petitioner was a legitimate businessman and not who or what the government claimed he was. At that point, two things were absolutely clear: the voice the government had been claiming for three months was petitioner's voice was extraordinarily distinctive — throaty, raspy and deep;[10] and (2) Dominick Manna was somewhat of a dim bulb. The following exchange occurred:

Q. [By the prosecutor] What's the name of [petitioner's] company?

A. [By Dominick Manna] I don't know. I don't have his card.

Q. Does he have a card?

A. Yes.

Q. A business card?

A. Yes.

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10. Dr. Peter Ladefoged, one of petitioner's voice experts, described petitioner's voice, at least in the lower pitch range, as "very raspy," a "creaky voice," Vol. 34, May 2, 1989, at 6659-60, and Mr. Owens agreed that petitioner has "this very unusual voice . . . there aren't too many other voices like that from what I've heard," Vol. 35, May 3, 1989, at 6971.

Q. You don't have any of them with you?

A. No.

Q. Could you get one for us?

A. Yes. He's got a card.

Then, addressing petitioner from the witness box, Dominick Manna asked, "You have a card?" In a rare, unguarded moment, petitioner responded in the same extraordinarily distinctive voice for all to hear, "Not on me." Vol. 39, May 18, 1989, at 7400-01. In this court's view, that was "game, set and match," and it had nothing to do with Mr. Brown.

Petitioner has pulled out all the stops seeking to lay his conviction at Mr. Brown's feet. He has not even come close. Singly or in combination, the acts and omissions challenged here as being the result of unreasonable or unprofessional judgment do not get petitioner even to first base. Mr. Brown's performance was not merely "reasonable considering all the circumstances," *Strickland*, 466 U.S. at 688, but was terrific.

II. *Police and/or Prosecutorial Misconduct*

Moving on, then, to the claim of police and/or prosecutorial misconduct, and the cry of "*Brady* violations" raised thereto. The claim is utter nonsense. A *Brady* violation is seen where the prosecution suppresses or withholds information that is both favorable and material to the defense. *United States v. Perdomo*, 929 F.2d 967, 970 (3d Cir. 1991). Even if the information petitioner proffers was both favorable

and withheld, and it was not, information is "material" only where there exists a "reasonable probability" that had that information been disclosed, the result at trial would have been different. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). There is no such possibility here.

"The worst of the non-disclosures," says petitioner (Pet. ¶ 25),[11] was a disregard of what he euphemistically calls "evidence" that one Angello Castelli murdered Irwin Schiff, a killing orchestrated by the Gambino crime family and not by petitioner and his cohorts from the Genovese family. The "evidence" comes from a few pages in a 1993 autobiography by a retired Queens County, New York, detective, Remo Franceschini, in which, amidst considerable poetic license, he relates that "sometime after the killing," an informant, "who had a minor case pending in Queens and[,] for considerations," told Franceschini that Schiff had been killed by Castelli. Exh. J to Pet. Franceschini "brought this information over to the lieutenant at the 19th detective squad in Manhattan," which had the case, and made "several reports" to the effect that Schiff's killing was orchestrated by the Gambino family. He spoke, as well, to some unnamed Newark investigator for the Newark Strike Force and told him why he did not believe that "CC" on the tapes meant "construction company which meant Schiff." *Id.* Parenthetically, Franceschini does not say that he told the investigator anything about Castelli, who had been killed in November, 1987 in a fight with a construction worker over girlfriends. Shortly thereafter, a separate informant

11. In the reply to the government's answer, there is another supposed non-disclosure that is now the "most serious." Decl. of Vivian Shevitz at ¶ 27. *See* pages 27-29, *infra*.

supposedly told Franceschini that John Gotti's son-in-law had once said to Castelli, while looking at a picture of Schiff, "Whaddaya think you're so tough because you put this fat bastard out?" Franceschini, the story goes, told an assistant chief of detectives of the 19th squad in Manhattan that "it looks very strongly like Castelli." Gov't. Exh. 7.

No affidavit from Franceschini has been provided and all this court is given is the Declaration of Raymond P. Glynn, a private investigator retained by co-defendant Desciscio after the indictment in this case was returned. On March 30, 1994, Glynn, accompanied by another private investigator, Edward Siedlick (who interestingly, and apparently recently, authored the new set of defense transcripts), interviewed Franceschini. Exh. K to Pet. Although Siedlick has submitted an affidavit addressed to how he went about preparing the new defense transcripts, his affidavit is notably silent as to the meeting with Franceschini. Exh. B to Pet.

As relevant here, Glynn avers that Franceschini confirmed that what he had written in his book concerning the Schiff murder "was true and substantially correct as to his actions" and that "shortly after the Schiff murder [Franceschini] prepared reports, based on confidential information he received, and submitted them to the commanding officer of the nineteenth detective squad and the Manhattan District Attorney's Office." Exh. K to Pet. And, finally, Glynn states that on March 21, 1997, Franceschini confirmed by telephone what he said on March 30, 1994. Petitioner argues that "it appears that the police, or even the prosecutors, 'buried' evidence provided to them by Franceschini before [petitioner's] trial, that the Schiff

murder was committed by another person having nothing to do with petitioner." Pet. ¶ 112. This, he concludes, "was a *Brady/Kyles* violation at best, or even worse." *Id.* at ¶ 118.

The Franceschini information was the subject of one of the numerous Freedom of Information Act ("FOIA") lawsuits petitioner commenced *pro se*, this one before the Hon. Dickinson R. Debevoise. After conducting an investigation, Robert Stewart, Chief of the U.S. Attorney's Office Strike Force Division, advised the court by letter dated April 29, 1994 that "none of the federal authorities having responsibility for the Manna prosecution in Newark in 1988-89 knew of Franceschini or his supposed informant information about Castelli" until after the book was published in 1993. Exh. Z to Pet. Moreover, Mr. Stewart interviewed Franceschini on March 1, 1994 and Franceschini told him that "he had never spoken to anyone from the 'Newark Strike Force' nor, for that matter, to any federal prosecutor or investigator on either side of the Hudson River about the Schiff homicide before, during or after the *Manna* prosecution." *Id.* Indeed, Franceschini admitted that the "Newark investigator" was, rather, one Pablo Guzman, a television reporter, who Franceschini spoke to after the transcripts in this case were publicly filed following the trial. As noted earlier, Franceschini has not, by affidavit or otherwise, taken issue with any of Mr. Stewart's conclusions nor has he supported by affidavit or otherwise what he said in his book.[12] And, interestingly, petitioner's counsel's

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12. In his reply to the government's response, albeit as to an issue raised to show that Mr. Brown was ineffective, petitioner castigates the government for failing to present a sworn statement (Cont'd)

Declaration in Reply to the government's answer, accuses Franceschini of "obfuscation of the truth." Decl. of Vivian Shevitz at ¶ 5.

While bemoaning Mr. Stewart's "reports of "hearsay" (Pet. ¶ 122) and conveniently ignoring the rank hearsay on which this claim is based, petitioner seems sufficiently satisfied with the results of Mr. Stewart's investigation to turn the focus of his attention from the federal prosecutors and investigators to the New York City police to whom Franceschini allegedly reported his information, complaining of the federal authorities only that they have not done anything — such as, one imagines, interviewing the entire 19th precinct — to correct the "injustice," itself a "serious Due Process violation." Parenthetically, he also states, presumably with a straight face, that even if Franceschini *himself* was responsible for the "suppression," habeas relief would lie. Decl. of Vivian Shevitz at ¶ 41. But Mr. Stewart's investigation also included "a page by page reexamination of the raw homicide file from the New York City Police Department, which Judge Barry reviewed for *Brady* purposes during trial and sealed, [and which] fail[ed] to disclose a single entry or item of information which relates to the material in Franceschini's book." *Id.*

(Cont'd)
from Mr. Brown and concludes from this that "Mr. Brown had no good answer for his failures." Decl. of Vivian Shevitz at ¶ 23. To be consistent, petitioner must similarly conclude that Mr. Franceschini has no good answer to what the government has — and has not — uncovered. And given that, as result of this petition, the gloves would assuredly be off, the court would not be surprised if petitioner had not graced Mr. Brown with a copy of the petition so that he *could* answer and, most likely, give "good answer(s)."

Given all the above, there is simply no credible evidence before the court — indeed, there is not even any longer a claim — that Franceschini's so-called exculpatory information was ever in the possession of the United States government or any agency thereof at any time and there is no credible evidence that there were any reports in the possession of the New York City police. *A fortiori*, even if that information was material, which it was not, it was not suppressed, much less deliberately suppressed.

Petitioner complains of a "further" suppression of favorable evidence with regard to the Schiff murder, a "suppression"' to which he allotted one and one-half pages in his lengthy petition and described as "paling" in comparison to the Franceschini information. Pet. ¶ 126. In his reply, however, the Franceschini information, when stripped of the rhetoric which pervades the reply, has been largely relegated to the cutting room floor and this "'further" suppression is now "the most serious." Decl. of Vivian Shevitz at ¶ 27. Most serious, indeed!

This "further" suppression is based on an FBI report of what the New York City police had found at the scene of the Schiff murder, prepared two days later, and obtained by petitioner under FOIA. Exh. BB to Pet. The report states that on August 8, 1987 at approximately 10:35 p.m., five minutes before the murder which took place at 10:40 p.m., an unnamed tenant in the building adjacent to the restaurant in which Schiff was murdered saw a man with a hood on his head standing near the restaurant's fire exit door. Parenthetically, petitioner mischaracterizes the report in two respects, stating that the tenant "had seen a man in the hallway with a mask on." Pet. at ¶ 128.

Appendix D

The argument goes as follows. Vivian Lewis, who identified co-defendant Desciscio as the man she saw in the corridor between the restaurant and her building prior to the Schiff murder, did not say that he was masked. Pet. at ¶¶ 128-129. Petitioner assumes that the unnamed tenant to whom the report refers was Ms. Lewis and, thus, argues that the statement in the report that the man was masked could have been used to impeach her and should have been turned over. He does not argue that the statement directly exculpates him — or even Desciscio — and, of course, it does not.

But the statement of the unnamed tenant, whoever she may have been, does not in any way contradict Ms. Lewis' testimony at trial or any of her numerous prior statements, *see, e.g.*, Vol. 26, April 19, 1989, at 5043-44, 5070, 5082-83, 5194, that at 10:15 p.m. she saw Desciscio in the corridor and he was not wearing a mask, and she surely was extensively cross-examined. The unnamed tenant saw a man at 10:35 p.m., twenty minutes later, and she saw him near the restaurant's fire exit door, not in the corridor.

Not only was there no contradiction, but there is nothing from which it can be concluded that the unnamed tenant was Mr. Lewis, and everything cuts the other way. First, Ms. Lewis and the unnamed tenant were both interviewed shortly following the murder. Unlike the unnamed tenant, Ms. Lewis identified herself at the outset — and in every statement thereafter, all of which were turned over — reinforcing the conclusion that the unnamed tenant was not her. Moreover, if Ms. Lewis had been the one to have seen the man with a hood on his head at 10:35 p.m., there was no reason for her not to have mentioned that fact when she described what

she had seen at 10:15 p.m. It must also be remembered that the unnamed tenant saw a man at the exit door of a busy restaurant on a busy evening. The man she saw could have been a patron or an employee of the restaurant or a mere bystander but assuredly it was not Desciscio who, at trial, was described as having been neatly dressed in a suit — certainly not with a "hood on his head." But petitioner wants this court to believe that the man seen by the unnamed tenant was involved in the murder so that if this court also believes that Ms. Lewis was the unnamed tenant, he could then argue that she could have been impeached had the report been turned over. To show the man's involvement, and a sinister involvement at that, he plucks a "mask" out of the air when the report merely refers to a man having "a hood on his head." Had the "hood on his head" covered that man's face, it surely would have been noted.

Different time, different location, different tenant, and different man. The impeachment value of this "most serious" suppression is nil.

One final instance of the government's supposed suppression of exculpatory evidence need only briefly detain the court. Petitioner complains that yet another document obtained by him under FOIA should have been, but was not, turned over by the government. Pet. at ¶¶ 105-107. That document, a very brief FBI 302 of an August 22, 1988 interview with one Robert Anthony Delvescovo, Exh. V to Pet., has Delvescovo saying little more than who and what he did *not* know, what he could *not* explain, and that "he did not want to give up any friends." Presumably because one of the few things he did admit was that he had recently played

and taken numbers bets, petitioner argues that Delvescovo was involved in the gambling operation at issue in this case and that the "Bobby" referred to on the November 12, 1987 tape was not Louis "Bobby" Manna but was "Bobby" Delvescovo.

Of course, even if there was another "Bobby" involved in this gambling operation (although the 302 says only that Delvescovo "would not say how large a business *he* had," *id.*, (emphasis supplied)), in no way does it follow that petitioner was not also involved. That aside, the references on the November 12th tape to a conversation in which one high ranking person in the gambling operation asked another whether he had "been in touch with Bobby" with regard to a numbers operation problem and the other stating, shortly thereafter, that she had called "Bobby" and "Bobby" told her what to do, indicate that "Bobby" was much more involved than Delvescovo claimed to have been even in the business "he had." *Id.* In any event, nothing in the 302 even suggests that Delvescovo was the "Bobby" to whom the speakers on the November 12th tape were referring, and certainly nothing suggests that petitioner was *not* that "Bobby." Moreover, petitioner was on a number of other tapes — tapes petitioner ignores — which dealt with the gambling operation and which make quite clear his leadership role in that operation. Nothing in the 302 warranted turnover.

The three cited instances of government misconduct, individually or in combination, amount to absolutely nothing. There is no possibility, much less a reasonable probability, that had the information to which petitioner points been

disclosed to him, the "whole case [would have been put] in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

The petition will be dismissed. An appropriate order shall issue.

s/ Maryanne Trump Barry
MARYANNE TRUMP BARRY,
U.S.D.J.

Dated: January 29th, 1998

Appendix D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action
No. 97-2034(MTB)

LOUIS ANTHONY MANNA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER

This matter being opened to the court on petitioner's motion pursuant to 28 U.S.C. §§ 2255 and 2241, and the court having decided same on the papers submitted, without oral argument, pursuant to Fed. R. Civ. P. 78; and

For the reasons expressed in this court's opinion of even date,

It is on this 29th day of January, 1998

Ordered that the petition be and hereby is dismissed.

s/ Maryanne Trump Barry
MARYANNE TRUMP BARRY
U.S.D.J.

APPENDIX E — ORDER OF THE UNITED STATES SUPREME COURT DENYING PETITION FOR WRIT OF CERTIORARI DATED APRIL 1, 1991

UNITED STATES SUPREME COURT

No. 90-1364

Louis Anthony Manna,

Petitioner

v

United States

* * *

April 1, 1991. Petition for writ of certiorari to the United State Court of Appeals for the Third Circuit denied.

* * * *

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED NOVEMBER 21, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket Number 89-5821

U.S.

v.

Manna

11/21/90
AFFIRMED

* * * *

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED JANUARY 2, 2001

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-5131

LOUIS ANTHONY MANNA,

Appellant

vs.

THE UNITED STATES OF AMERICA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 97-cv-02034)

SUR PETITION FOR REHEARING

BEFORE: BECKER, *Chief Judge*,
SLOVITER, MANSMANN, SCIRICA, NYGAARD,
ROTH, MCKEE, RENDELL, BARRY, AMBRO
and FUENTES, *Circuit Judges*

The Petition for rehearing filed the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing,

and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered.

By the Court,

s/ [illegible]
United States Circuit Judge